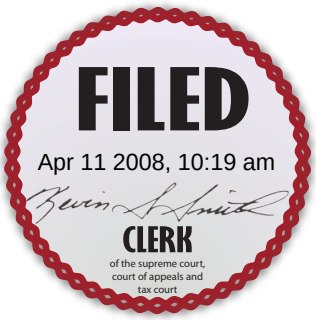

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IN THE
COURT OF APPEALS OF INDIANA

KEITH BILLINGSLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0705-CR-262
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
Cause No.49G22-0701-FB-2565

April 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a guilty plea, Keith Billingsley appeals his thirteen-year sentence for robbery, a Class B felony. Billingsley argues that his sentence is inappropriate given the nature of the offense and his character. Concluding the sentence is not inappropriate, we affirm.

Facts and Procedural History

On January 4, 2007, Billingsley entered the Beverly Nursing Home at 7145 East 21st Street in Indianapolis, Indiana. Inside the lobby, he encountered a nursing home employee, Kay Cox, at the reception desk. He told Cox that he intended to apply for a job working in the nursing home's kitchen. After Cox informed Billingsley that no such job existed, he asked to use the telephone. Cox denied Billingsley's request to use the telephone, but obliged when Billingsley asked her to place a call for him. As Cox was making the call, she saw Billingsley reach over the reception desk and snatch her purse from an open desk drawer. Cox immediately grabbed Billingsley by his shirt and pulled him over the desk to prevent him from escaping with her purse. A brief struggle ensued and Billingsley was able to wrest the purse away from Cox's grasp. Cox sustained injuries during the struggle.

Before Billingsley could flee the building, another nursing home employee encountered Billingsley in the lobby and managed to obtain Cox's purse from him. Billingsley, empty-handed, fled the building but was caught and detained by other nursing home employees until the police arrived. After he was advised of his Miranda rights, Billingsley admitted to police that he entered the nursing home with the sole purpose of

stealing property in order to support his crack-cocaine addiction. Further, Billingsley admitted that he lied about applying for a job at the nursing home and had Cox make the telephone call in order to distract her so he could steal her purse.

On January 5, 2007, the State charged Billingsley with one count of robbery, a Class B felony. On March 21, 2007, Billingsley pled guilty pursuant to a plea agreement whereby the State agreed to refrain from seeking an habitual offender enhancement and to recommend the executed portion of his sentence be capped at fifteen years. At the sentencing hearing, the trial court made the following statement:

> Mr. Billingsley, I have reviewed the pre-sentence investigation report and clearly you are aware that an aggravated sentence is called for in this case.[1] There is the mitigator that you have accepted responsibility and the information that your attorney and the State provided to me a few minutes ago. I do consider those situations to be mitigators but the aggravators are your prior criminal history which includes nine prior felony convictions. I will go through a few of them for the record: forgery, July 27, 2006; theft, January 18, 2006; C felony robbery and habitual offender, July 21, 1994; theft, a D felony, June 17 2004; auto theft, April 29, 1991; and those are just some of the felony convictions on your record. So I do find the aggravators outweigh any mitigators and I will sentence you on Count One to a period of thirteen years in the Department of Corrections . . . .[T]he court finds that because you committed this new offense of Robbery…while you were on probation . . . that you have violated the terms and conditions of your probation. Your probation is revoked. The Court will order that you serve two years executed at the Department of Corrections to be served consecutively to [your sentence for Robbery] . . . . [T]hat is a total of fifteen years as your sentence, Mr. Billingsley.

Transcript at 37-39. Billingsley now appeals.

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[1] We are careful to note that a defendant's criminal history does not compel the lower court to order a sentence above the advisory. However, a defendant's criminal history is clearly a valid consideration in determining a defendant's sentence. We do not interpret this statement to indicate that the trial court felt bound to issue any particular sentence given Billingsley's criminal history. Rather, we interpret this statement

Discussion and Decision

I. Standard of Review

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). When determining whether a sentence is inappropriate, we recognize that the advisory sentence "is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. "When conducting this inquiry, we may look to any factors appearing in the record." Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007), trans. denied. The burden is on the defendant to demonstrate that his sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Billingsley argues that his sentence is inappropriate given the nature of the offense and his character. He argues that "he was remorseful, lacked the statutory intent of using force to complete a theft,[2] had cooperated with police voluntarily to solve unrelated crimes

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to be a comment that the trial court felt circumstances called for a sentence above the advisory. It is important to recognize this decision is purely discretionary.

[2] Billingsley admitted at his guilty plea hearing that he put the victim "in fear or by using or by threatening the use of force . . . which resulted in bodily injury, that is, contusions and physical pain." Tr. at 12. If Billingsley is arguing that there is an insufficient factual basis to support his guilty plea, he is not entitled to raise this argument on direct appeal. See Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004) ("A

and the offense itself was not the worst of its type." Appellant's Brief at 6. At the outset, it should be noted that the advisory sentence for robbery as a Class B felony is ten years. Ind. Code § 35-50-2-5. In this case, the trial court sentenced Billingsley to thirteen years, three years above the advisory sentence and seven years below the maximum sentence. Also, the thirteen-year sentence for the robbery charge was two years below the cap set forth in Billingsley's plea agreement with the State.

II. Nature of the Offense

Billingsley argues that this robbery was not "the worst of its type" and therefore his sentence departing from the advisory sentence is inappropriate. Appellant's Br. at 7.[3] In making this argument, Billingsley also claims that this robbery was atypical in that "[h]ad the victim not responded . . . the case could have ended up a simple theft because it is not clear . . . that except for the owner's behavior there was any force, threat of force or fear involved in the initial taking." Id. We recognize that Billingsley's robbery might not be the most egregious that we have seen. Still, although it does not appear that Billingsley intended to use violence, we hasten to point out that the threat of violence was inherent in Billingsley's act of attempting to steal a purse from a nearby victim. Although the nature of the offense, by itself, may not render appropriate a sentence above the advisory, we must also evaluate

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person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal."). Although we need not and do not make any statement as to whether the trial court properly accepted the guilty plea, we point out that the element of robbery requiring use of force can be accomplished when such force is used in eluding the victim. Cooper v. State, 656 N.E.2d 888, 889 (Ind. Ct. App. 1995).

[3] We point out that Billingsley did not receive a maximum sentence, and that therefore, his comment that his offense was not the "worst of its type" is slightly misplaced. See Bacher v. State, 686 N.E.2d 791, 802 (Ind. 1997) (recognizing that maximum sentences should be reserved for the worst offenses and offenders).

the sentence in light of Billingsley's character.

III. Character of the Offender

We recognize that Billingsley pled guilty and that trial courts should be "inherently aware of the fact that a guilty plea is a mitigating circumstance." Francis v. State, 817 N.E.2d 235, 237 n.2 (Ind. 2004). "[A] defendant who pleads guilty deserves to have mitigating weight extended to the guilty plea in return." Anglemyer v. State, 875 N.E.2d 218, 220 (Ind. 2007) (opinion on reh'g). However, a guilty plea is not always a significant mitigating circumstance. See Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2007), trans. denied. A guilty plea's significance is reduced if it is made on the eve of trial, if the circumstances indicate the defendant is not taking responsibility for his actions, or if substantial admissible evidence exists against the defendant. Id. Also, the plea may not be significant "when the defendant receives a substantial benefit in return for the plea." Anglemyer, 875 N.E.2d at 221.

Here, there was substantial admissible evidence against Billingsley including eyewitness identification and Billingsley's admission of guilt to investigating police officers. Also, Billingsley received a substantial benefit by pleading guilty as the State agreed to cap the executed portion of his sentence at fifteen years although the maximum sentence for such a crime is twenty years. Ind. Code §35-50-2-5. Further, pursuant to the plea agreement, the State agreed to refrain from seeking the habitual offender enhancement that would have exposed Billingsley to an additional thirty years of imprisonment. It is clear that Billingsley's decision to plead guilty was a pragmatic one. Given these circumstances,

Billingsley's guilty plea has minimal impact on our analysis of his character. See Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006) (noting that the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably upon his character as it might otherwise"), trans. denied.

Next, Billingsley points out that he offered police his assistance in solving unrelated crimes. We recognize that under some circumstances, cooperation with police may comment favorably on a defendant's character. See Cloum v. State, 779 N.E.2d 84, 89 (Ind. Ct. App. 2002). The extent to which Billingsley helped police is not entirely clear from the record.[4] Further, he offered this assistance after he had been apprehended and was facing significant time in prison. Cf. Shields v. State, 699 N.E.2d 636, 640 (Ind. 1998) (finding no abuse of discretion in trial court's failure to assign mitigating weight to a defendant's statement to police after being apprehended). Indeed, under the circumstances of the case, Billingsley has failed to present any evidence that this cooperation was anything more than a pragmatic decision made in an attempt to secure leniency.

Most importantly, Billingsley has an extensive criminal history. The pre-sentence investigation report reveals that Billingsley has nine prior felony convictions including theft,

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[4] The transcript of the sentencing hearing states:
[Billingsley's counsel]: . . . I wanted to point out there, that [Billingsley] had offered to help law enforcement. I spoke with homicide regarding an investigation in Pennsylvania but charges weren't filed against the defendant there so he did participate. I asked Detective (inaudible) and he said, "I really can't, because he didn't assist me," but he certainly did offer. I could not express that in open court.
[Prosecutor]: Your Honor, yes.
The Court: Do you concur with that, Mr. [Prosecutor]?
[Prosecutor]: Your Honor, it is possible that Mr. Billingsley's cooperation in that investigation is (inaudible).

robbery, auto theft, and forgery. Billingsley has been incarcerated eight times and received a total of eleven incident reports while serving his prior sentences. Billingsley's prior convictions weigh heavily against his character because many of those crimes were felonies and involved the taking of property. See Prickett v. State, 856 N.E.2d 1203, 1209 (Ind. 2006) (explaining that the significance of a defendant's prior criminal history in determining whether to impose a sentence enhancement will vary "based on the gravity, nature and number of prior offenses as they relate to the current offense" (quoting Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004))).

Further, we note, as the trial court did, that Billingsley committed the instant offense while on probation. Such a circumstance also comments negatively on Billingsley's character. Cf. Ind. Code § 35-38-1-7.1(a)(6) (recognizing that a defendant's recent violation of a condition of probation may constitute an aggravating factor); Ryle v. State, 842 N.E.2d 320, 323 n.5 (Ind. 2005) ("While a criminal history aggravates a subsequent crime because of recidivism, probation further aggravates a subsequent crime because the defendant was still serving a court-imposed sentence."), cert. denied, 127 S.Ct. 90 (2006).

The burden was on Billingsley to demonstrate that his sentence was inappropriate based on the nature of the offense and his character. Our review of the record, especially Billingsley's substantial and related criminal history and his probationary status at the time of the offense, leaves us convinced that Billingsley has failed to carry this burden.

Conclusion

We conclude Billingsley's sentence of thirteen years executed for the robbery

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Tr. at 33.

conviction was not inappropriate in light of his character and the nature of the offense.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.